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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARTHUR YOUNG & COMPANY,

Petitioner,

—v.—

ROGER L. SUMMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHERE A FEDERAL SECURITIES FRAUD CLAIM IS TIME-BARRED ON THE FACE OF THE COMPLAINT, MAY A PARTY INVOKE THE FEDERAL EQUITABLE TOLLING RULE TO PREVENT THE STATUTE OF LIMITATIONS FROM RUNNING DURING THE PERIOD OF TIME WHEN THE COMPLAINT ALLEGATIONS SHOW THAT PLAINTIFF KNEW HE HAD BEEN INJURED?

2. WHERE THE ALLEGED FRAUDULENT CONCEALMENT TOLLING THE STATUTE OF LIMITATIONS IN A FEDERAL SECURITIES FRAUD CLAIM ARISES OUT OF THE REPEATED FAILURE TO MAKE ANY OF THE ANNUAL PUBLIC FILINGS AND DISTRIBUTION OF STOCKHOLDER REPORTS MANDATED BY THE FEDERAL SECURITIES LAWS, DOES THE DISCLOSURE PHILOSOPHY OF THE FEDERAL SECURITIES LAWS PREVENT A PARTY FROM INVOKING THE FEDERAL EQUITABLE TOLLING RULE?

3. WHERE THE CONGRESSIONALLY CREATED TOLLING RULES OF THE FEDERAL SECURITIES LAWS WOULD NOT SAVE AN EXPRESS CIVIL LIABILITY CLAIM, MAY A COURT APPLY THE JUDICIALLY CREATED TOLLING RULE TO SAVE AN IMPLIED CIVIL LIABILITY CLAIM?

LIST OF PARTIES

The petitioner and defendant below is Arthur Young & Company, a general partnership of certified public accountants with offices throughout the United States which provides accounting, auditing, tax, and management advisory services to its clients. The respondent, plaintiff below, is Roger L. Summer, an individual. Other defendants below are Land & Leisure, Inc.; Guy Bailey, Sr.; Guy Bailey, Jr.; Jerome Grossman; Areca Stone Bailey; Charlotte Babcock; Raymond James Associates, Inc.; and Robert R. Fischer. Another defendant, Robert Little, died after the action was filed.

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—v.—

ROGER L. SUMMER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Arthur Young & Company ("AY") petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 664 F.2d 965 (5th Cir. 1981), is set forth in the Appendix ("A.____") at A.1a to A.11a. The opinion of the United States District Court for the Southern District of Florida is set forth in the Appendix at A.12a to A.18a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1981. A timely petition for rehearing was denied by that court on January 29, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m, provides:

> No action shall be maintained to enforce any liability created under section [11] or section [12](2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section [12](1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section [11] or section [12](1) of this title more than three years after the security was bona fide offered to the public, or under section [12](2) of this title more than three years after the sale.

STATEMENT OF THE CASE

I.

THE PARTIES AND THE COMPLAINT

Roger L. Summer ("Summer") seeks recovery of the losses he sustained in connection with his purchases of the securities of Lano & Leisure, Inc. ("L & L") more than a decade ago.[1]

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1 The facts set forth herein, unless otherwise noted, are those accepted as true from Summer's complaint. Certain key allegations from the prolix complaint are repeated at A.19a to A.25a.

Allegedly in reliance on a 1971 offering prospectus of L & L filed under the Securities Act of 1933 (" '33 Act"), Summer purchased 9,500 shares of L & L in eleven separate transactions over an 18 month period.[2]

The complaint was filed in February, 1978, almost seven (7) years after Summer's first purchase and more than five (5) years after his last purchase. In addition to L & L, the issuer, Summer sued Raymond James, the underwriter, various individuals alleged to have been officers and/or directors of L & L at various times from 1971 (the "insider" defendants), and petitioner AY, who, as L & L's auditor, allegedly aided and abetted the other defendants in the sale of L & L stock in connection with the public offering.

As to AY, the complaint asserted violations of § 10(b) of the Securities Exchange Act of 1934 (" '34 Act"), 15 U.S.C.

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Date of Summer's Purchase	*No. of Shares Purchased*	*Price of L & L Shares*	
		Low	*High*
June 24, 1971	3,000	10	10-3/8
	600		(as of July 26, 1971)
June 20, 1971	400	10	10-3/8 (as of July 26, 1971)
August 5, 1971	500	9-3/8	9-6/8
August 6, 1971	500	9-3/8	9-6/8
October 2, 1972	500	2	2-3/8
October 26, 1972	500	1-6/8	2-1/8
November 10, 1972	500	1-4/8	2
November 20, 1972	500	2-3/8	2-7/8
December 20, 1972	500	1-3/8	1-7/8
December 27, 1972	1,000	1-3/8	1-7/8
January 3, 1973	1,000	1-2/8	1-3/4

The table is a composite of Summer's purchase amounts and dates taken from the complaint (Count I, ¶ 15) and the price of L & L on each such date as reported in STANDARD AND POOR'S OVER THE COUNTER DAILY STOCK PRICE INDEX. The District Court took judicial notice of the stock prices.

§ 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; of §§ 11, 12(2), and 17 of the '33 Act, 15 U.S.C. §§ 77k, l(2) and q; and pendent state and Blue Sky Law claims. The alleged improprieties in the complaint relate to purported misrepresentations in the 1971 offering prospectus. No other misrepresentations are alleged.

Summer alleged that L & L's true financial condition was concealed from him since June, 1971 in that L & L (1) did not file its annual and quarterly reports with the Securities & Exchange Commission ("SEC") on Forms 8-K and 10-K, (2) did not mail L & L's annual reports and proxy statements to shareholders, (3) did not call or hold any annual shareholders' meeting, and (4) did not respond to his repeated requests for information about L & L or, when L & L did respond, it offered the hollow refrain "it is in the mail." (A.23a-25a.) In other words, for over six years Summer did not get any of the materials he as a stockholder expected to receive, was required by law to be given, and repeatedly requested. These failures, which Summer alleges he was aware of, are the acts of fraudulent concealment upon which Summer relies to invoke the equitable tolling rule.

II.

THE DISTRICT COURT'S DISMISSAL AND THE COURT OF APPEAL'S REVERSAL

As the complaint was filed more than five years after Summer's last purchase, the District Court[3] granted AY's and the other defendants' motions to dismiss all federal claims on the grounds that they were time-barred on their face and dismissed the state law claims for lack of pendent jurisdiction. (A.12a-15a.)

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3 AY's statute of limitations dismissal motion was based on FED. R. CIV. P. 12(b)(6) and 12(g). AY asserted numerous other grounds for dismissal which, at AY's request, the District Court held in abeyance pending resolution of the limitations issue.

The Fifth Circuit affirmed the dismissal of Summer's §§ 11 and 12(2) claims under the '33 Act (A.4a-5a) concluding that they were absolutely barred even after giving effect to the Congressionally created tolling provision in § 13 of the '33 Act, 15 U.S.C. § 77m. It reversed the District Court's dismissal of the remaining claims against L & L and the "insider" defendants based upon § 10(b) of the '34 Act and § 17 of the '33 Act. (A.8a)

The Fifth Circuit affirmed the District Court's dismissal of the remaining '33 and '34 Act claims as to AY and Raymond James conceding that Summer's tolling allegations were inadequate under FED. R. CIV. P. 9(b). (A.10a). Nevertheless, because it reversed as to the other defendants, the Fifth Circuit directed Summer be given leave to replead his tolling theory with "more particularized allegations as against [AY and Raymond James] . . . if he can do so." [4] *Id.*

REASONS FOR GRANTING THE WRIT

For more than 150 years this Court has consistently recognized and implemented the sound policies of statute of limitations. Although in limited circumstances this Court has allowed a federal equitable tolling exception to an otherwise dispositive statute of limitations defense, the decision of the Fifth Circuit squarely conflicts with the prior federal tolling decisions of this Court and of other courts of appeal, both in the manner in which it applied the exception and the conclusion drawn by the panel from the undisputed facts alleged in

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4 This was done notwithstanding the fact that Summer did not even suggest in either his briefs below or on appeal that he knew of other acts of fraudulent concealment which had not been pleaded. Nor at oral argument before the Fifth Circuit did his counsel offer other facts which justified invocation of the tolling rule. (As of the filing of this petition, plaintiff has not filed a new pleading.) In any event, AY submits that as a matter of law Summer's pleadings negate any possible fraudulent concealment and demonstrate that the statute of limitations expired.

Summer's own complaint. Further, the Fifth Circuit's decision in this case fundamentally contradicts the disclosure philosophy underlying the Securities Acts. Perhaps most important, however, is that review by this Court will give needed guidance to the lower federal courts,[5] laboring under crowded dockets and heavy caseloads, concerning the treatment of summary motions with respect to patently time-barred claims and the limited federal equitable tolling doctrine.

Finally, allowing application of the general federal equitable tolling rule to save a time-barred complaint, where the statutory tolling rule in the federal securities laws for civil liability claims expressly created by statute would bar the claim, runs counter to clearly mandated Congressional policies.

I

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS

It long has been recognized that the statute of limitations is a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938). Indeed, more than 100 years ago Justice Swayne wrote:

> Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unneces-

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5 A search of decisions in LEXIS involving statute of limitations in federal securities cases since 1975 show that there are over 600 decisions. This does not begin to scratch the surface of the number of motions to dismiss on statute of limitations grounds which were denied in unreported decisions.

> sary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

Wood v. Carpenter, 101 U.S. 135, 139 (1879). *Accord*, *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, Kansas & Texas Railway Co. v. Harriman*, 227 U.S. 657, 672 (1913). This Court recently reaffirmed the public policies underlying statutes of limitations when it noted that they "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them'." *United States v. Kubrick*, 444 U.S. 111, 117 (1979), citing *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

In certain special circumstances limited exceptions to the general limitations principles have been permitted, such as the federal equitable tolling rule invoked here.

> [W]hen there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing. . . .

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349-50 (1874).[6]

Actual personal knowledge of the alleged fraud by a plaintiff is not required before a plaintiff is denied the benefit of the federal equitable tolling rule. "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he

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6 *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) extended this federal equitable tolling doctrine to cases where, because of Congress' silence, the federal cause of action borrows a state statute of limitations. *See, infra* at 14-17.

used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it." *Wood v. Carpenter*, 101 U.S. at 141. (Citations omitted.) In determining such constructive knowledge, " '[w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led'." *Id.* (Citation omitted.)

As Justice Story cautioned, invocation of the tolling doctrine must be allowed sparingly, lest the exception swallow the rule:

> It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose.

Bell v. Morrison, 1 Pet. 351, 360 (1828); *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) (statutes of limitations "are not to be construed so as to defeat their obvious intent").

This court recently reaffirmed and clarified the limited role of equitable tolling when it rejected the contention that a statute of limitation is tolled until a plaintiff has actual knowledge of a legal cause of action. *United States v. Kubrick*, 444 U.S. at 122. Rather the test is simply whether a plaintiff knows he has been injured. *Id.* Moreover, as this Court made clear, this rule is not limited to medical malpractice claims, but also covers claims under other federal statutes involving complex matters, *id.* at 124,[7] such as federal securities cases.

Once a plaintiff has, or is charged with, such knowledge, the statute starts to expire because he "is no longer at the mercy of

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7 Nonetheless, some circuit courts appear confused as to the impact of *Kubrick* in non-diversity federal cases. *E.g., Premium Management, Inc. v. Walker*, 648 F.2d 778, 783 n.7 (1st Cir. 1981).

the [wrongdoer]. There are others who can tell him if he has been wronged, and he need only ask." 444 U.S. at 122. He must exercise due diligence in seeking to learn the facts which would disclose the fraud. Even if a defendant committed acts of concealment, equitable tolling ceases when the plaintiff first had reason to become suspicious or aware of the possibility of wrongdoing. This is particularly true when the plaintiff's own allegations show that he was on constructive notice of the fraud. *E.g.*, *Klein v. Bower*, 421 F.2d 338, 343-44 (2d Cir. 1970), a case involving a § 10(b) claim.

A. Summer's Pleading Negates Any Right to Use the General Federal Equitable Tolling Rule.

In dismissing Summer's complaint, the District Court considered

- the precipitous 80% price decline within 14 months of Summer's initial purchase (A. 14a, 17a); and

Summer's own allegations concerning

- the failure of L & L to send a single one of the annual shareholder reports as required by SEC regulations;
- L & L's failure to hold a single annual shareholders' meeting; and
- L & L's failure to provide Summer with financial information he expressly demanded, and L & L's repeated statements that it was forthcoming, but in fact never came. *Id.*

The District Court concluded that the *synergistic* result of his knowledge of these accumulated facts was that Summer, as a matter of law, was on notice and failed to exercise the due diligence required by the equitable tolling rule.[8]

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8 Since the federal tolling doctrine is equitable in nature, there is room for exercise of discretion by a court on the issue of a plaintiff's discovery and diligence in § 10(b) cases when the pleadings show that

(footnote continued on next page)

Although the Fifth Circuit acknowledged that the clock starts running for statute of limitations purposes when the plaintiff has actual *or* constructive knowledge of facts which, in the exercise of due diligence, would have led the plaintiff to discover the alleged fraud (A.5a), it treated each of the elements on which the district court relied separately and ignored the synergistic effect of the totality of these elements.

> We can conceive of several factual situations in which a price decline, under the circumstances here, would not be indicative of fraud in the least, *e.g.*, a depressed real estate market caused either by tight money or recession.[9]
>
> With respect to the failure to send annual stockholders' reports and hold annual stockholders' meetings, none of the defendants have cited any case, nor have we found one, which holds that the mere failure to send such reports or hold such meetings is sufficient to put an investor on notice of facts which in the exercise of due diligence would have led to actual knowledge of fraud.

(A.7a-8a. Footnote omitted.)

The Fifth Circuit initially erred by improperly bifurcating the price decline[10] from the other facts known to Summer and

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the action would be time-barred but for the equitable doctrine. *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 693 (10th Cir. 1981) [The case also contains a review of the evolution of the tolling exception and its equitable foundation]. Such equitable discretion has been described as the reason why summary dispositions by district courts have been affirmed by the various circuit courts. *Id.* at n. 13.

9 The Fifth Circuit's hypothesizing about a possible decline in the real estate market as the cause of the loss in L & L price (A.7a, n.2) is unsupportable. Summer's first purchase of L & L at the 80% reduced price was in October 1972, well before the real estate decline which occurred in the United States in 1974. *See, e.g., Trattner v. American Fletcher Mortgage Investors*, 74 F.R.D. 352, 355 (S.D. Ind. 1976); *Fruchthandler v. Blakely*, 73 F.R.D. 318, 321 (S.D.N.Y. 1976).

10 Such a price decline is the actual injury suffered by Summer. Awareness of injury is precisely what this Court found dispositive in *United States v. Kubrick*, 444 U.S. at 122.

concluding that neither category of information by itself was sufficient to put Summer on notice. (A.7a-8a.) Such a severance of the different factual matters admittedly known to Summer fails to recognize that the whole is greater than its parts. Taken as a whole, the facts gave rise to a duty, as a matter of law, to investigate further and discover the cause of Summer's injury. One simply may "not await [a] leisurely discovery of the full details of the alleged scheme." *Klein v. Bower*, 421 F.2d at 343.

The Fifth Circuit's approach is directly at odds with other circuit court decisions which, in affirming statute of limitation dismissals, considered a severe price decline not in isolation but in conjunction with other miscellaneous factors. *See, e.g., Gaudin v. KDI Corp.*, 576 F.2d 708, 712-13 (6th Cir. 1978); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975).[11] Indeed, considering the importance which many circuit courts have placed on the role of a security's price in the marketplace, *e.g.*, the "fraud on the market" theory of *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976), the Fifth Circuit's failure to give due weight to significant price fluctuations, such as here, in assessing a plaintiff's due diligence and failure to investigate the causes of such a decline is error.

Especially significant here is that Summer expressly alleged that the very acts of concealment employed to cover up the

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11 *Gaudin* and *Berry Petroleum* also demonstrate the Fifth Circuit's error in apparently attempting to side-step the L & L price decline by asserting that evidence of a price decline is limited to cases when there was a specific misrepresentation relating to the value of the securities. (A.7a, n.2.) The coincidental fact that the four cases cited by the Fifth Circuit happen to involve a customer and a broker-dealer, a relationship in which statements about price may be expected to occur, does not show that evidence of a price decline is restricted to such situations. *Gaudin* and *Berry Petroleum* considered a price decline without relation to specific misrepresentations concerning price. Rather they viewed a sharp price decline as one factor among others that should have caused a reasonable person to inquire. That is precisely what the District Court did here.

fraud consisted of the failure to send the annual reports, make the required public filings, etc. (A.23a-24a.) Summer's undisputed actual awareness of such affirmative acts of "concealment", as a matter of law, charged him with a duty of further inquiry and prohibits his invocation of the tolling rule.[12]

The Fifth Circuit flatly disregarded both the spirit and the direct holdings of this Court's consistent application of statute of limitations principles and the equitable tolling rule when it refused to affirm the District Court's common sense finding of Summer being on notice of a possible claim and his lack of due diligence. The Fifth Circuit's attenuated construction of the tolling doctrine resulted in a defeat of the very intent and goals of the statutes of limitation. *See Bell v. Morrison*, *supra*; *Campbell v. Haverhill*, *supra*.

II

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DISCLOSURE PHILOSOPHY UNDERLYING THE SECURITIES ACTS

The decision below is particularly pernicious because of its casual treatment—indeed almost condoning—of L & L's conceded and habitual failure to file the annual 8-K and 10-K reports with the SEC or to provide the required annual report or proxy materials to shareholders. (A.8a.) In this aspect the decision is inherently flawed and is fundamentally contrary to the philosophical foundation of the Securities Acts.

The '33 and '34 Acts are firmly grounded on the theory that disclosure and publicity of relevant information about an issuer and its securities is the best way to protect the investing public. I LOSS, SECURITIES REGULATION, at 121-28 (2d ed.

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12 Here, the promises to send the reports and the repeated failures to send reports, etc., required by statute, by their very absence cried out for investigation and due diligence by Summer.

1961) ("LOSS"); II LOSS, at 784-85.[13] Disclosure was chosen by Congress as the means of investor protection because it "prevents the kind of defrauding and exploitation of inexperienced investors which depends for its success on nondisclosure, or inadequate or misleading disclosure, by securities dealers or corporate insiders." Anderson, "The Disclosure Process in Federal Securities Regulation: A Brief Review," 25 HASTINGS L. J. 311, 314 (1974), *esp.* n. 14 citing H.R. REP. NO. 85, 73d CONG., 1st SESS. 7 (1933) and H.R. REP. NO. 1383, 73d CONG., 2d SESS. 11 (1934). (Footnote omitted.)[14]

The disclosure theory is embodied in the Securities Acts in several ways relevant here. Section 13(a) of the '34 Act requires the filing of current and annual reports, on Forms 8-K and 10-K respectively, by L & L directly with the SEC. 15 U.S.C. § 78m; 17 C.F.R. §§ 240.13a-11 and 240.13a-1. Congress believed such periodic filings were the *minimum* required for the adequate protection of investors. *E.g.*, S. REP. NO. 792, 73d CONG., 2d SESS. (1934). L & L also was required to disseminate to Summer and other shareholders a separate annual report to stockholders. 17 C.F.R. § 240.14c-3. The first such annual stockholders' report was due a few months after the end of L & L's September 30, 1971 fiscal year, which occurred shortly after Summer's first purchases, and each year thereafter.

Summer's own complaint alleges, however, that *never*, over a period of some six years, were any of the public 8-K or 10-K filings made by L & L, and *never* did L & L send a single required stockholders' report. (A.23a-24a.) The Fifth Circuit

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13 The preamble to the '33 Act expressly declares its purpose is to "provide full and fair disclosure of the character of securities sold . . . and to prevent frauds in the sale thereof . . . ." SECURITIES ACT OF 1933, PUB. L. NO. 73-22 (1933).

14 This disclosure philosophy stemmed directly from Justice Louis Brandeis' firm belief that "[s]unlight is said to be the best of disinfectants". I LOSS at 123, quoting Brandeis, OTHER PEOPLE'S MONEY, (1914).

erroneously asserted that such known violations of the federal securities laws were of no moment for statute of limitations purposes. This directly conflicts with the very philosophy of the Securities Acts and greatly demeans the steps mandated by Congress to protect investors.

Contrary to the Fifth Circuit's belief, if disclosure is the means to deter investor fraud, then L & L's repeated and uniform refusals to make the mandated statutory disclosures and filings necessarily and logically leads to the conclusion that shareholder rights, which Congress sought to protect, have been infringed and that a shareholder is then on notice as a matter of law that he may have a claim. He then has a duty to determine the extent of that claim. Mere suspicion that one has been injured by wrongdoing, not certainty of fraud, is all that is required to start the statute running. *Wood v. Carpenter, supra*. Summer thus had an undeniable, clear, and immediate duty to investigate. He did not do so.

The Fifth Circuit's decision clearly conflicts with the basic theory underlying the Securities Acts and justifies a grant of *certiorari* on that ground alone.

III

INVOCATION OF THE JUDICIALLY CREATED TOLLING RULE IS INCONSISTENT WITH THE CONGRESSIONALLY CREATED TOLLING RULE.

The only alleged misstatements occurred in the offering prospectus filed with the SEC by L & L in June 1971. Thus, Summer had available remedies expressly granted by Congress in § 11 of the '33 Act and § 18 of the '34 Act.[15] 15 U.S.C. §§ 77k and 78r. However, any claim under those express remedy provisions is limited by specific congressionally enacted

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15 No claim was asserted by Summer under § 18 even though it was applicable to his purchases of L & L securities.

limitations periods, 15 U.S.C. §§ 77m and 78r(c), which provide that a purchaser must bring suit within one year from the date he knew or should have known of the claim or no more than three years from the date of purchase. Thus, when Congress specifically authorized a civil remedy for security law violations, it also created an absolute outside limit of three years in which suit could be brought and only allowed a limited equitable tolling period.[16]

To allow the general federal equitable tolling doctrine to repudiate the specific tolling doctrine created by statute is inconsistent with a Congressionally mandated policy. Where Congress has so clearly spoken on the issue, we believe it is inappropriate for a court to apply the general federal equitable

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16 In every situation in which civil liability is expressly provided for in the '33 and '34 Acts, an express limitation period is also provided. Section 13 of the '33 Act provides an absolute 1-year period for actions for failure to register under Section 5 of such Act, and a period of 1 year from discovery or 3 years from sale for actions by buyers for misstatements or omissions in the sale of any security. Under the '34 Act a similar 1 and 3 year period is applicable to actions based on manipulative and fraudulent actions on a national securities exchange (§ (9)(e),15 U.S.C. § 78i(e)); actions based on misleading statements and documents filed with the Securities Exchange Commission (§ 18(c), 15 U.S.C. § 78r(c)); and actions to void contracts (§ 29(b), 15 U.S.C. § 78cc(b)). The only exception to the 1 and 3 year pattern is a 2-year statute applicable to the recovery of insider profits under § 16(b) of the '34 Act. Even so, it is evident that Congress manifested a clear intent to prescribe a limited limitations period under both the '33 and '34 Acts. The intent of Congress to prescribe a short limitations period for violations of the federal securities acts is underscored by the fact that § 207 of the '34 Act reduced the limitations period set forth in § 13 of the '33 Act "(a) by striking out 'two years' wherever it appears therein and inserting in lieu thereof 'one year'; (b) by striking out 'ten years' and inserting in lieu thereof 'three years'; and (c) by inserting immediately before the period at the end thereof a comma and the following: 'or under section 12(2) more than three years after the sale.' " 73d CONG. C. 404, Title II, § 207, 48 Stat. 980. *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976), where this Court noted that in borrowing state statutes it was assumed they were generally consistent with this the one/three year structure of the securities act.

tolling doctrine, *cf. Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979),[17] and the Courts should be controlled by the express provisions of the securities acts. *Rosenberg v. Globe Aircraft Corp.*, 80 F. Supp. 123, 124 (E.D. Pa. 1948), [the venue requirements applicable to §§ 11 and 12(2) of the 1933 Act should be applied to an action under Rule 10b-5: "It cannot be supposed that Congress intended to abolish these regulations and limitations when it enacted Sec. 10 of the Act of 1934."] *Compare McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 228-29 (1958), where Justice Brennan said in concurring:

> I do not believe that the absence of specific directions from Congress leads necessarily to the result that state statutes of limitations should apply in cases of this sort. The reason is that the considerations which in *Campbell v. Haverhill*, *supra*, and *Cope v. Anderson*, *supra*, prompted resort to the state statutes do not apply at all here. Those cases represented intensely practical solutions to a practical problem in the administration of justice. *In the absence of any comparable federal statute of limitations which might be applied*, the Court had four choices: (1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations. The state statutes were chosen by default.
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> No such default is necessary in this case since the Court can look elsewhere for the measure of the seaman's federal right to recover for unseaworthiness. Just as

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17 On April 5, 1982 this Court granted certiorari in *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir.), *reh. den.*, 650 F.2d 815 (1981), to determine, *inter alia*, whether an implied civil liability may be created by the Courts when an express remedy is otherwise available. If this Court were to answer that question in the negative, Summer would have no claim here. However, even if the Court finds that an implied remedy could exist coextensively with an express remedy, the question remains whether a congressionally imposed limitation on the exercise of the express remedy can be ignored by allowing a more liberal period for the implied remedy.

equity follows the law in applying, as a rough measure of limitations, the period which would bar a similar action at law, see *Russell v. Todd*, 309 U.S. 280, 287, I think that the maritime cause of action for unseaworthiness could be measured by the analogous action at law for negligence under the Jones Act, 46 U.S.C. § 688. This reference seems especially appropriate since the seaman's remedy for unseaworthiness under the general maritime law and his remedy for negligence under the Jones Act are but two aspects of a single cause of action. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316.

CONCLUSION

For the reasons set forth above, petitioner Arthur Young & Company prays that a writ of certiorari be issued to review the judgment below.

DATED: April 15, 1982
New York, New York

Respectfully submitted,

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